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In The

Supreme Court of the United States

MARIA SUZUKI OHLER,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

REPLY BRIEF FOR PETITIONER

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PRELIMINARY STATEMENT

The main thrust of the Brief for the United States, ("BUS") is that definitive *in limine* rulings, particularly those that require a weighing of probative value and prejudice, do not exist. With this premise in hand, the Solicitor General contends that an automatic waiver rule must follow. In responding to this argument, this reply brief spends much time debunking the Solicitor General's premise. By doing so, however, petitioner does not wish to lead the Court astray from the issue presented for review.

In short, definitive *in limine* rulings are rendered on a daily basis in federal district courts throughout the country. When these rulings are rendered, the parties and the judge treat them as the law of the case, and the trial proceeds accordingly. The real question for the Court is whether a defendant who has lost an objection to such a definitive ruling automatically waives the right to appeal that ruling when she attempts to mitigate its "sting." The answer is no.

STATEMENT OF THE CASE

The Solicitor General only disputes one material fact. In a somewhat equivocal manner, he contends that the record demonstrates that the district court's Rule 609 ruling "was less than definitive." BUS at 11 n.6. The specific circumstances of the Rule 609 ruling outlined in the Brief for Petitioner ("BP"), however, demonstrate that the ruling was definitive. *See* BP at S-7. In addition, the district court, itself, believed that it had definitively ruled, as reflected by its docket entries on the day of the ruling. *See* JA at 3.

Like the district court, the court of appeals also considered the ruling definitive: "On the morning of the first

day of [petitioner's] trial, this district court concluded that, if [petitioner] were to testify on her own behalf, evidence of her past criminal conviction would be admissible under Rule 609(a)(1) to impeach her credibility." JA at 147-48. The court of appeals did not find that the ruling was in any way tentative or even "less than definitive."[1]

The Solicitor General, however, points to an exchange between the district court and the prosecutor that occurred two days before the Rule 609 ruling in support of his claim that it was "less than definitive." At that time, the district court and the prosecutor were discussing a different evidentiary issue. JA at 72. The prosecutor indicated to the district court that what he would "prefer to do is simply reserve" that other issue so that he could "revisit that issue with the Court." *Id.* In response, the district court stated: "You can always revisit the issue, Mr. Kelly [the prosecutor]. No ruling I make is with prejudice; I always keep an open mind." *Id.* Despite the Solicitor General's contention, the specific circumstances of the district court's Rule 609 ruling, which demonstrate that it was definitive, should trump this more generalized comment made on a different day and in the context of the prosecutor asking the district court to reserve ruling on a different issue. *Cf. Edmond v. United States*, 520 U.S. 651, 657 (1997) ("Ordinarily, where a specific provision conflicts with a general one, the specific governs.").

The only case cited by the Solicitor General in support of his contention that the district court's comment to

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[1] Not only was the court of appeals making a commonsense assessment of the record, but it was also accepting the government's characterization of the proceedings. Throughout its brief to the court of appeals, the government repeatedly characterized the district court's decision as its ruling and did not contend that it was "less than definitive."

the prosecutor rendered the Rule 609 ruling "less than definitive" is the Third Circuit's decision in *Walden v. Georgia-Pacific Corp.*, 126 F.3d 506 (3d Cir. 1997), *cert. denied*, 523 U.S. 1074 (1998). The circumstances in *Walden*, however, were quite different. There, "[t]he district court clearly stated at the outset of the [*in limine*] hearing that its rulings were tentative and that it would reconsider those rulings at trial, and the court never retreated from that position." *Id.* at 520.[2] "Moreover, and tellingly, [appellant]s' counsel attempted to introduce at trial other evidence that was excluded at the *in limine* hearing, which suggests that he understood the court's protocols." *Id.*

In this instance, the district court did not clearly state at the outset of the *in limine* hearing that its rulings were tentative, nor did it ever make such a statement. Even if its comment to the prosecutor could be stretched into such a statement, the nature of its subsequent Rule 609 ruling and further warning to defense counsel that petitioner's prior conviction was "obviously" admissible would constitute a retreat from that position. JA at 100. In addition, unlike counsel in *Walden*, petitioner's counsel evidently believed that the ruling was definitive, as he never would have attempted to mitigate the "sting" if he thought otherwise.

In sum, "[o]n a record such as here, it [is not] a matter of conjecture whether the District Court would have allowed the Government to attack petitioner's credibility at trial by means of the prior conviction." *Luce v.*

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[2] The Third Circuit expressed displeasure with such "tentative" rulings, observing: "we are hard pressed to see the advantages of an *in limine* hearing that only produces tentative rulings. The game would hardly be worth the candle. But that is what we are faced with here, hence we deal with it." *Id.* at 517.

United States, 469 U.S. 38, 42 (1984). That is because the district court's Rule 609 ruling was definitive, nothing less.

ARGUMENT

I.

A DEFENDANT DOES NOT ABANDON THE RIGHT TO APPEAL AN ADVERSE RULE 609 RULING BY ATTEMPTING TO MITIGATE THE "STING."

A. Introduction

Although the Solicitor General begins his analysis by proceeding directly to a discussion of *Luce* and various policy considerations, he does not appear to dispute petitioner's assertion that the question presented for review must be answered by using the three-pronged method established by the Court for interpreting the Federal Rules of Evidence ("the Rules"). Accordingly, as already argued, before considering such policy considerations in the context of *Luce*, the plain language and legislative history of Rules 103 and 609 must be considered.

B. Plain Language

The Solicitor General does not contend that the plain language of Rules 103 and 609 supports an abandonment interpretation. Instead, he essentially maintains that those rules are silent as to whether the right to appeal is abandoned by attempting to mitigate the "sting," and therefore the plain language does not provide the answer.

The Solicitor General, however, ignores the fact that Congress usually specifies when a defendant's conduct constitutes a waiver. *See* Fed. R. Crim. P. 12(f) (describing when a "[f]ailure by a party to raise defenses or objections . . . shall constitute waiver thereof"); *see also* Fed. R.

Civ. P. 12(h). Indeed, even when Congress has specified that a defendant's conduct constitutes a waiver, "the court for cause shown may grant relief from the waiver." Fed. R. Crim. P. 12(f). Thus, the Solicitor General's contention that the Rules silently provide for an *automatic* waiver rule is quite unusual.

Nevertheless, the Solicitor General contends that because waivers of evidentiary objections are "presumptively available," an automatic waiver rule is not precluded by its omission from the plain language of Rules 103 and 609. BUS at 6, 19 (citing *United States v. Mezzanatto*, 513 U.S. 196 (1995)).[3] The presumption articulated in *Mezzanatto*, however, adds very little to the analysis. Of course waiver is *available*. For example, had petitioner entered an unconditional guilty plea in the middle of her trial, she clearly would have waived the right to appeal her objection to the district court's Rule 609 ruling. *See, e.g., United States v. Olano*, 507 U.S. 725, 733 (1993). The relevant inquiry is not whether waiver is available but whether the Rules provide for waiver under the instant circumstances.

In essence, the Solicitor General emphasizes the wrong presumption. Instead, "[c]ourts should 'indulge every reasonable presumption against waiver[.]" *Barker v. Wingo*, 407 U.S. 514, 525 (1972) (quoting *Aetna Ins. Co. v. Kennedy*, 301 U.S. 389, 393 (1937)). Because nothing in the

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[3] Although the Solicitor General also cites the Court's recent decision in *New York v. Hill*, 120 S. Ct. 659 (2000) as restating the *Mezzanatto* presumption, he ignores *Hill*'s instruction "that waiver is not appropriate when it is inconsistent with the provision creating the right sought to be secured." *Id.* at 664-65. As petitioner has argued, BP at 22-23, an automatic waiver rule is inconsistent with Rule 609's specific intention to allow attempts to mitigate the "sting."

plain language of the Rules states that an attempt to mitigate the "sting" automatically constitutes a waiver, the Court should presume otherwise.

C. Legislative History

Once again, the Solicitor General does not maintain that the legislative history of Rules 103 and 609, as explicated by the common law, supports an automatic waiver rule. Instead, he maintains that "[t]here was no generally accepted" common-law view, and therefore it is unclear what rule Congress intended to adopt. BUS at 20.

Petitioner has cited *United States v. Maynard*, 476 F.2d 1170, 1175 (D.C. Cir. 1973) and *United States v. Puco*, 453 F.2d 539, 541 n.6 (2d Cir. 1971) as support for her claim that a no-abandonment approach was the prevailing common-law view at the time the Rules were enacted. The Solicitor General complains that those "decisions date from shortly before the enactment of the" Rules. BUS at 21. That, however, is the point, as the first sentence of the Advisory Committee's Notes to Rule 103 states that the rule was meant to codify "the law as generally accepted *today*." Fed. R. Evid. 103 Advisory Committee's Note (emphasis added).[4]

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[4] The Solicitor General contends that "the law" referred to in the first sentence of the Advisory Committee's Notes does not include the decisions taking a no-abandonment approach; instead, he argues that the first sentence only meant to reference the proposition of law stated in the second sentence of the notes. BUS at 20-21 n.14. In attributing such a limited meaning to the first sentence, the Solicitor General has defied traditional interpretive principles, as he has essentially rendered the first sentence "surplusage – as words of no consequence." *Ratzlaf v. United States*, 510 U.S. 135, 140-41 (1994).

The Solicitor General also contends that the Sixth and Ninth Circuits had adopted a different approach from the Second[5] and D.C. Circuits, and therefore there was no prevailing common-law view. BUS at 21-22. However, the Sixth Circuit decision cited, *United States v. Kiraly*, 445 F.2d 291, 292 (6th Cir. 1971), entertained the merits of the defendant's appeal, albeit without much analysis. The same can be said for *United States v. Tocki*, 469 F.2d 655, 657 (9th Cir. 1972), one of the Ninth Circuit decisions cited.

Thus, the Solicitor General is left with the divided opinion in *Shorter v. United States*, 412 F.2d 428 (9th Cir. 1969). *Shorter* is not "squarely on point." BUS at 22 n.17. The district court in that case did *not* render a definitive *in limine* ruling before the defendant introduced his prior convictions. The Solicitor General glosses over this distinction. Furthermore, while the Solicitor General believes that the defendant's failure to object to the prior convictions on constitutional grounds did not factor into

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[5] *United States v. Mariani*, 539 F.2d 915, 920-21 (2d Cir. 1976) did not render the common-law view in the Second Circuit unclear. *See* BUS at 21 n.6. It is not a common-law case, *Mariani*, 539 F.2d at 920 n.3, and, in any event, is not on point. In *Mariani*, the defendant made a pretrial motion to prohibit the government from using his prior conviction. The district court ruled that the conviction was admissible to show motive but did not make a ruling on whether it was admissible for impeachment. The government did not introduce the conviction in its case-in-chief. Nevertheless, the defendant testified about the conviction on direct examination, even though he never objected on Rule 609 grounds and the government never "committed itself to using the [prior] conviction for impeachment." *Id.* at 920. Given these circumstances, the Second Circuit held that the introduction of the prior conviction could not constitute reversible error.

the majority's refusal to entertain the merits of the claim, *id.*, he does not explain why the majority addressed the constitutional claim separately from the purely evidentiary one.

In sum, the Advisory Committee's Notes explain that Rule 103 was meant to codify the law as generally accepted at the time the Rules were enacted. At that time, the prevailing common-law view was that an attempt to mitigate the "sting" did not constitute an abandonment of the right to appeal.[6] Finally, because most state courts did not address the issue until after the adoption of the Rules, their decisions are not particularly helpful in ascertaining a prevailing common-law view. Nevertheless, while petitioner agrees that the states "have taken varying approaches[,]" BUS at 24, she suggests that the prevailing view is that a defendant does not abandon an appeal by attempting to mitigate the "sting."[7]

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[6] The Court should not be persuaded by the contention that the Advisory Committee's Notes to the proposed amendment to Rule 103 undercut this analysis. BUS at 19-20 n.13. This commentary merely states that the *proposed amendment* does not address whether a party abandons the right to appeal by attempting to mitigate the "sting." BP at A-11. The commentary does not state that Rule 103, as it now exists, fails to address the question. Furthermore, even if the current Advisory Committee believes that Rule 103 is unclear as to whether a defendant abandons the right to appeal by attempting to mitigate the "sting," that does not mean that the original Advisory Committee, and the Congress that enacted Rule 103, took the same view. *Cf. United States v. Price*, 361 U.S. 304, 313 (1960) ("the views of a subsequent Congress form a hazardous basis for inferring the intent of an earlier one").

[7] *See, e.g., People v. Carpenter*, 988 P.2d 531, 556 (Cal. 1999); *State v. Hardy*, 946 P.2d 1175, 1177 n.2 (Wash. 1997); *People v. Williams*, 641 N.E.2d 296, 309-10 (Ill. 1994); *Salt Lake City v. Holtman*, 806 P.2d 235, 237 (Utah App. 1992); *McGee v. State*, 569 So.2d 1191, 1194-95 (Miss. 1990); *State v. McGhee*, 746 S.W.2d 460, 463 (Tenn. 1988); *State v. Miller*, 443 A.2d 906, 913-14 (Conn. 1982); *State v. Griffin*, 323 N.W.2d 198, 202 (Iowa 1982); *State v. Noble*, 612 P.2d 497, 498 (Ariz. 1980); *Vanlue v. State*, 275 N.W.2d 115, 118-19 (Wis.Ct. App. 1978), *rev'd on other grounds*, 291 N.W.2d 467 (Wis. 1980); *People v. Harris*, 272 N.W.2d 635, 638-39 (Mich. App. 1978); *State v. Ryan*, 380 A.2d 525, 527-29 (Vt. 1977).

D. Policy Considerations

1. *Luce*

The crux of the Solicitor General's argument is that *Luce* articulated various views about the nature of *in limine* rulings, particularly in the Rule 609(a)(1) context, which dictate an automatic waiver rule under the instant circumstances. Specifically, he contends that an *in limine* ruling on a prior conviction's admissibility under Rule 609(a)(1) is "necessarily tentative" because it requires a district court to balance probative value and prejudice. BUS at 11. From this premise, the Solicitor General leaps to the conclusion that an attempt to mitigate the "sting" should automatically constitute an appellate waiver because it "deprives the district court of the opportunity to rule definitively on the admissibility of the prior conviction in light of the evidence at trial, including the defendant's own testimony on direct examination, and thereby to avoid a potential error that could jeopardize any verdict of guilt obtained in the case." BUS at 15. This argument is flawed.

First, the premise is unsound. An *in limine* ruling on Rule 609(a)(1) evidence is not "necessarily tentative" because it requires a balancing of probative value and prejudice. Virtually all evidence admitted at trial is subject to a similar balancing test under Rule 403. Accordingly, under the Solicitor General's reasoning, it would be

quite rare for a district court to render a definitive *in limine* ruling in any context. As stated earlier, the result is that *in limine* hearings "would hardly be worth the candle." *Walden*, 126 F.3d at 517.[8]

Perhaps more importantly, the Rules specifically contemplate definitive *in limine* rulings even in contexts where probative value and prejudice must be balanced. For example, the unanimous view among the courts of appeals is that Rule 404(b) evidence must satisfy a Rule 403 balancing test in order to be admissible. *See* 2 Jack B. Weinstein & Margaret A. Berger, *Weinstein's Federal Evidence* § 404.21 [3] [a], at 404-58-404-60.1 n.37 (2d ed. 1999) (*"Weinstein's Evidence"*) (collecting cases). In order to introduce Rule 404(b) evidence, the government must provide a defendant, upon request, with "reasonable notice." Fed. R. Evid. 404(b). The notice requirement is designed to "promote early resolution on the issue of admissibility." Fed. R. Evid. 404(b) Advisory Committee Note. Also, nothing in the notice provision "precludes the court from requiring the government to provide it with an opportunity to rule *in limine* on 404(b) evidence before it is offered or even mentioned during trial." *Id.* Clearly, then, the Rules refute the Solicitor General's position that *in limine* rulings, particularly those that require a balancing of probative value and prejudice, can never be definitively made.

Strangely, the Solicitor General has routinely approved interlocutory appeals filed by the government

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[8] Such a state of affairs contradicts the proposed amendment to Rule 103, which specifically contemplates "definitive rulings . . . before trial." BP at A-5. It also conflicts with the realities of trial practice, as definitive *in limine* rulings are made every day in federal district courts throughout the country.

pursuant to 18 U.S.C. § 3731, *see* 28 C.F.R. § 0.20, of *in limine* rulings which have required a balancing of probative value and prejudice. *See, e.g., United States v. Rodriguez*, 192 F.3d 946 (10th Cir. 1999) (government appeal of exclusion of evidence under Rule 403); *United States v. Guardia*, 135 F.3d 1326 (10th Cir. 1998) (same); *United States v. Adrian*, 978 F.2d 486 (9th Cir. 1992) (same in Rule 404(b) context). It seems quite odd that the Solicitor General believes that such *in limine* rulings are definitive enough to halt the entirety of district court proceedings so that the government can file an interlocutory appeal, but are not definitive enough for a defendant to act upon them at trial.

With respect to Rule 609(a)(1) rulings in particular, the Solicitor General, by failing directly to respond to *amici*'s contention that an automatic waiver rule creates a systemic inequity in appellate rights, BUS at 26 n.22, apparently believes that the government can file an interlocutory appeal of an *in limine* ruling excluding a defendant's prior conviction.[9] Certainly, if appellate courts can make definitive rulings on Rule 609(a)(1) evidence before trial, district courts can do the same. Not only *can* district courts make such rulings, but courts and commentators have emphasized that "[t]he admissibility of convictions [under Rule 609] *should* be determined before trial whenever possible." 4 *Weinstein's Evidence* § 609.22, at 609-62 (collecting cases) (emphasis added). Indeed, even the Solicitor General's own authority states that such issues are particularly "amenable" to pretrial resolution.

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[9] In response to *amici*'s argument, the Solicitor General only asserts that the government cannot file an interlocutory appeal under section 3731 if a district court rules *in limine* that one of its witnesses can be impeached with a prior conviction under Rule 609. BUS at 26 n.22.

Gendron v. Pawtucket Mut. Ins. Co., 409 A.2d 656, 661 n.11 (Me. 1979).

Despite the Solicitor General's contention, BUS at 10, *Luce* does not contradict this authority and the realities of trial practice by stating that a district court can never render a definitive *in limine* ruling on Rule 609(a)(1) evidence. Instead, *Luce* merely stated that a "reviewing court" cannot consider an appeal when it does not know "the precise nature of the defendant's testimony," *Luce*, 469 U.S. at 41; *id.* at 43 (Brennan, J., concurring) ("The careful weighing of probative value and prejudicial effect that Rule 609(a) requires of a district court can only be evaluated adequately *on appeal* in the specific factual context of a trial as it has unfolded.") (emphasis added), and it is only faced with a "preliminary ruling" to review. *Id.* at 42-43.[10]

While *Luce* did state that a district court "is free, in the exercise of sound judicial discretion, to alter a previous *in limine* ruling," *id.* at 41-42, this comment must be read in the context of the procedural history of the case. As already explained, the district court in *Luce* only made a tentative ruling. Certainly, when a district court informs the parties that it has only rendered a tentative ruling, it is free, during the course of the trial, to change that ruling as it sees fit. However, the language in *Luce* does

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[10] The ruling in *Luce* was only "preliminary" or tentative because the district court explained "that the nature and scope of [Luce's] trial testimony could affect [its] evidentiary rulings; for example, [it] was prepared to hold that the prior conviction would be excluded if [Luce] limited his testimony to explaining his attempt to flee from the arresting officers. However, if [Luce] took the stand and denied any prior involvement with drugs, he could then be impeached by the [prior] conviction." *Luce*, 469 U.S. at 40.

not mean that a district court can never make a definitive *in limine* ruling. Indeed, just as a district court "is free, in the exercise of sound judicial discretion," *id.* at 41, to alter tentative rulings, it is also free, in the exercise of that same discretion, to determine when and how definitively it wants to rule.

When a district court exercises its discretion to make a definitive *in limine* ruling, it chooses, as Judge Easterbrook has explained, to "send [a] message that the right time [for objection and argument] has come and gone." *Wilson v. Williams*, 182 F.3d 562, 566 (7th Cir. 1999) (*en banc*). Furthermore, when a district court chooses to send such a message, any "conjecture [about] whether [it will] allow[ ] the Government to attack [a defendant's] credibility at trial by means of the prior conviction" ceases. *Luce*, 469 U.S. at 42. In other words, at that point, the parties and the appellate courts know that the evidence will be admitted at trial.

In short, the premise that a district court can never make a definitive *in limine* ruling on Rule 609(a)(1) evidence is simply incorrect. District courts can make such definitive rulings, should make such rulings, and normally do make such rulings. *See, e.g., Wilson*, 182 F.3d 562. Indeed, the district court in this case did just that.[11]

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[11] One could even argue that, despite the Solicitor General's contention, BUS at 9, 27 n.23, a defendant has a right, in some circumstances, to a definitive Rule 609(a)(1) ruling before trial. Rule 12(e) of the Federal Rules of Criminal Procedure provides: "A motion made before trial *shall* be determined before trial unless the court, for good cause, orders that it be deferred for determination at the trial of the general issue or until after verdict, but no such determination shall be deferred if a party's right to appeal is adversely affected." Fed. R. Crim. P. 12(e) (emphasis added). Rule 12(e) was designed "to

Because the Solicitor General erroneously believes that *in limine* rulings on Rule 609(a)(1) evidence are "necessarily tentative," he wrongly concludes that a district court will always want the opportunity to change such supposedly tentative rulings thereby "avoid[ing] a potential error that could jeopardize any verdict of guilt obtained in the case." BUS at 15. In essence, in order to suit his own interests in this particular case, the Solicitor General has mischaracterized the nature of all *in limine* rulings and further assumed what a district court's interests are in rendering such rulings.

For a variety of reasons, many district courts, such as the one in this case, may want to render a definitive ruling at the *in limine* stage. A district court may prefer to rule while the relevant law is fresh in its mind. It may be particularly bothered with interruptions during trial, which require the jury to wait for long periods of time. It may believe that a definitive *in limine* ruling will help the parties settle the case, or it may believe that it has heard all of the arguments and has all of the information that it needs to make a definitive ruling. In the Rule 609 context, a district court may believe that, in fairness, the parties should have an advance ruling so that a defendant can decide whether to remain silent or to mitigate the "sting," or so the government can exercise its right to file an interlocutory appeal. The reasons are endless.

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discourage the tendency to reserve rulings on pretrial motions until after verdict in the hope that the jury's verdict will make a ruling unnecessary." Fed. R. Crim. P. 12 Advisory Committee Note. Similarly, a Rule 609 question cannot be reserved, without good cause, in the hope that a defendant will not testify thereby making a ruling unnecessary. In any event, this issue is obviously left for another day, as the district court in this case rendered a definitive *in limine* ruling.

Despite these endless reasons, the Solicitor General believes that a district court can never make a definitive *in limine* ruling on Rule 609(a)(1) evidence and would never want to make such a ruling because of a desire to protect the government's record on appeal. Certainly, protecting the *government's* appellate record is not a district *court's* sole preoccupation. Although the Solicitor General emphasizes that district courts have broad discretion in controlling trial proceedings, BUS at 9 n.4, his contradictory argument hamstrings district courts, as it requires them to rule at a particular time, in a particular way, and for a particular reason.

In sum, the Solicitor General has distorted *Luce* to advance policy arguments that, if accepted, would seriously upset the nature of district court proceedings. In the end, the Solicitor General's absolutist view of *in limine* rulings conflicts with the realities of trial practice, realities that have developed over the years for very good policy reasons.

2. Rule 102

The Court should not be persuaded by the Solicitor General's attempts to undermine petitioner's Rule 102-based policy arguments. With respect to petitioner's claim that an abandonment interpretation unfairly requires a defendant to appear as if she is hiding facts from the jury, the Solicitor General contends that it is not even clear that remaining silent about the conviction on direct examination has any detrimental effect. BUS at 28 (citing an article written by former federal prosecutors). Empirical studies, however, have rejected the only authority cited by the Solicitor General. *See* Douglas S. Rice & Ellen L. Leggett, *Empirical Study Results Contradict Sponsorship Theory*, 7 No. 8 Inside Litig. 20 (1993).

Even federal prosecutors have consistently employed the "time-honored trial tactic" of attempting to mitigate the "sting." *United States v. Freeman*, 164 F.3d 243, 249 (5th Cir. 1999) (prosecutor attempted to mitigate the "sting"); *see, e.g., United States v. King*, 505 F.2d 602, 606 (5th Cir. 1974) (same). In short, trial attorneys for the government, criminal defense practitioners, Congress, and the Court, *see Old Chief v. United States*, 519 U.S. 172, 189 (1997), have all recognized the dangers associated with being perceived by the jury as hiding something. One discredited study should not cause the Court to doubt the unfairness of having to remain silent about the prior conviction on direct examination.[12]

With respect to judicial economy, the Solicitor General believes that a no-abandonment approach creates unnecessary expense because the government is not given the opportunity to decline to use the prior conviction and thereby avoid a potential appellate issue. BUS at 29. If, however, the government is uncertain about using the conviction, all it has to do is say so, and appropriate measures can be taken. *See* BP at 38-39. This is a very

[12] The contention that a jury instruction can eliminate an unfair perception, *see* BUS at 27, suffers from the traditional problem that calling the jurors' attention to the omitted testimony may be more harmful than the supposedly curative instruction. Perhaps more importantly, it seems odd to create a waiver rule through judicial legislation, and then, through further judicial invention, create a jury instruction to cure the problems with the judicially-created rule, when Congress has specifically provided that the way to cure this precise unfairness is to allow a party the freedom to attempt to mitigate the "sting."

slight burden when considering that the Court has traditionally "placed the entire responsibility on the prosecution to show [a] claimed waiver . . . ." *Barker*, 407 U.S. at 514.

The government should not be allowed to seek a prior conviction's admission, never mention any indecision about admitting the conviction, and then claim on appeal that a defendant has waived the right to challenge the conviction's admission because it may have ultimately decided not to introduce it. Under such circumstances, the government should be deemed to have waived the waiver argument. *Cf. United States v. Martinez-Salazar*, 120 S. Ct. 774, 783 (2000) (Scalia, J., concurring) (questioning "whether normal principles of waiver (not to say the even more fundamental principle of *volenti non fit injuria*) disable a defendant from objecting on appeal to the seating of a juror he was entirely able to prevent").[13]

Finally, the Solicitor General contends that a no-abandonment approach does not further the growth and development of the law of evidence because the record when a defendant attempts to mitigate the "sting" is not "concrete" enough for effective appellate review. BUS at 29. The Solicitor General, however, has not given one reason why the record in this case is insufficient for appellate review, including a harmless-error analysis.

[13] To the extent that *Martinez-Salazar*, 120 S. Ct. at 781, encourages a defendant not to deal with a district court's error in an attempt to win at trial, and instead simply to wait for appeal, it is merely *dicta*.

II.

AN AUTOMATIC WAIVER RULE UNCONSTITUTIONALLY INTERFERES WITH THE RIGHT TO TESTIFY.

With respect to petitioner's constitutional claim, the Solicitor General fails to recognize that *Rock v. Arkansas*, 483 U.S. 44 (1987), established a disjunctive test. Under the first prong of this disjunctive test, an evidentiary rule is unconstitutional if it arbitrarily interferes with the right to testify. The Solicitor General does not respond to petitioner's contention that an *automatic* waiver rule is constitutionally flawed because it arbitrarily applies even in the absence of any possible interest supporting such a rule.

This case is an excellent example. Here, it was clear that the district court wanted to render a definitive *in limine* ruling, did render such a ruling, and did not desire to reconsider the issue later at trial. Likewise, given the fact that the government affirmatively moved to admit the prior conviction, and given its subsequent arguments, there was no doubt that it was going to use the prior conviction on cross-examination. Accordingly, there are no interests that are served by applying a waiver rule in this case.

In addition, the Solicitor General's claim that an automatic waiver rule "operates merely to complicate a defendant's choice about when to testify on a *collateral* issue[,]" BUS at 32-33 (emphasis added), contradicts the position taken by the government's trial counsel, who argued to the district court that such evidence was "critical." JA at 65. The Court should hold the government to its original position in this case, *cf. Doggett v. United States*, 505 U.S. 647, 653 (1992) (rejecting government's attempt "to revisit the facts"), which is the correct one.

III.

A REMAND IS REQUIRED TO DETERMINE WHETHER ANY ABANDONMENT OF THE RIGHT TO APPEAL WAS KNOWING AND INTENTIONAL.

Assuming, but not conceding, that trial counsel could waive the right to appeal the Rule 609 ruling on behalf of petitioner, there has still been no finding that he knowingly and intentionally relinquished that right. Without citation to any authority, the Solicitor General argues that there does not have to be a remand for such a finding because trial "counsel is properly charged with knowledge of the waiver rule[,]" BUS at 34, as it had been articulated by the Ninth Circuit in *United States v. Williams*, 939 F.2d 721 (9th Cir. 1991).

The law in the Ninth Circuit, however, is to the contrary. *See United States v. Perez*, 116 F.3d 840 (9th Cir. 1997) (*en banc*). In *Perez*, the Ninth Circuit held that a defendant did not waive the right to appeal an erroneous jury instruction even though his attorney requested the instruction, because the record did not reveal that the attorney knew of the Ninth Circuit precedent that had held that the instruction was flawed. *Id.* at 844-46 (applying *Olano*). Accordingly, even if the right to appeal could be waived by trial counsel, a remand is still required to determine whether he knowingly and intentionally relinquished the right to appeal.

Finally, even if petitioner's trial counsel "is properly charged with knowledge of the" law, BUS at 34, it was not clear whether an automatic waiver rule, as articulated in *Williams*, still applied in the Ninth Circuit at the time of petitioner's trial. The Ninth Circuit had not considered whether the automatic waiver rule still applied after the 1990 amendment to Rule 609, which specifically clarified

that attempts to mitigate the "sting" are permitted. *See* BP at 30. The Ninth Circuit apparently believed that this was a significant enough development to revisit the issue in a published opinion. *See United States v. Ohler*, 169 F.3d 1200 (9th Cir. 1999). Moreover, at the time of the trial, the most recent precedent, albeit from another court of appeals, had rejected the automatic waiver rule. *See United States v. Fisher*, 106 F.3d 622 (5th Cir. 1997). Given this state of the law, it is not clear whether trial counsel knowingly and intentionally relinquished the right to appeal the Rule 609 ruling on behalf of petitioner.

CONCLUSION

The Court should reverse and remand with instructions to entertain the merits of the Rule 609 claim or, alternatively, with instructions to determine whether there was a knowing and intentional abandonment of the right to appeal.

Respectfully submitted,

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